

PROPOSED RULE AMENDMENTS OF SIGNIFICANT INTEREST

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Criminal Procedure

I. Criminal Rule 35

A. Brief Description

The proposed amendments to Rule 35 define “sentencing” as used in the rule to mean the “oral announcement of the sentence” for purposes of correcting a sentence. “Sentencing” triggers the seven-day period for making corrections in the sentence for an “arithmetical, technical, or other clear error.” The existing rule is ambiguous because “sentencing” can be construed to mean either the “entry of judgment” or “oral announcement of the sentence.”

B. Arguments in Favor

- The proposed definition of “sentencing” eliminates the ambiguity. It identifies a definite event to trigger the time period within which the sentence can be corrected.
- The seven-day period to correct an error in a sentence often begins to run sooner if it starts on the date of the “oral announcement of the sentence” rather than on the date of the “entry of judgment,” which might occur days or weeks after the oral announcement of sentence.
- The majority of courts that have addressed this issue recognize the “oral announcement of the sentence” as the triggering event for purposes of this rule.

C. Objections

- The “entry of judgment” triggers the ten-day time period to file a notice of appeal in a criminal case. Identifying a different triggering event in Rule 35 might be a trap for the practitioner, who may mistakenly assume that a Rule 35 motion can be filed within the time to appeal.

- If the judgment of conviction is entered more than seven days after the oral announcement of sentence and it differs from the oral announcement of sentence, the judge will not have the opportunity to declare which version is correct.

D. Rules Committees' Consideration

The proposed Rule 35 amendments initially published for comment defined sentencing to mean the “entry of judgment.” On reconsideration and in light of the Department of Justice’s and the National Association of Criminal Defense Lawyers’ objections, the committees decided to adopt the majority view of the courts defining sentencing to mean “oral announcement of the sentence.” The committees determined that there likely would be less confusion generated if the majority view was adopted. The status quo would be maintained in most districts. More practitioners are accustomed to computing their time to file a Rule 35 motion from the “oral announcement of the sentence” than from the “entry of judgment” and would not require reeducation. Moreover, because significant time lags may arise between the oral announcement of sentence and entry of judgment, the committees agreed that the interests of finality would be better served by setting the triggering event as the “oral announcement of the sentence.”

II. Rules Governing § 2254 Cases and § 2255 Proceedings

The Rules Governing § 2254 Cases and § 2255 Proceedings have not been significantly amended since their inception in 1976. During this time, the habeas corpus landscape has substantially changed. In particular, three events have prompted the advisory committee to undertake a comprehensive revision of the rules. First, the courts have adopted different procedures to fill in gaps in the rules that have emerged from the original set of rules, creating non-uniform practices. Second, the Antiterrorism and Effective Death Penalty Act (Public Law No. 104-132 — AEDPA) was enacted in 1996, which contains substantive provisions directly affecting the § 2254 and § 2255 rules. And third, the Federal Rules of Criminal Procedure were comprehensively restyled in 2002 to improve their clarity and simplicity. The proposed amendments to the § 2254 and § 2255 rules adopt the best practices of courts, conform to AEDPA rules-related provisions, and improve the rules’ clarity, consistent with the comprehensive style revision of the Federal Rules of Criminal Procedure. The proposed amendments to the rules did not raise controversy.

III. Illustrative Forms Following Rules Governing § 2254 Cases and § 2255 Proceedings

A. Brief Description

The proposed revisions to the illustrative forms accompanying the § 2254 and § 2255 rules conform to the proposed amendments to the rules. They received general support and generated little controversy. But two revisions in the illustrative forms were considered at length during the advisory committee's deliberations. The first eliminated a list of "frequently cited grounds for relief." The second retained questions requiring the petitioner or movant to set out all the grounds raised concerning the judgment of conviction in any previous motion, petition, or other application.

B. Arguments in Favor of Eliminating List of "Frequently Cited Grounds for Relief"

- The list of "frequently cited grounds for relief" set out in the illustrative forms is not complete and may create confusion. Persons filing pro se may be misled into believing that they are limited to asserting only claims that are included in the list.
- The list may lead to abuse by providing the petitioner or movant irrelevant information that might be used to assert unmeritorious claims, needlessly burdening the respondent and the court.

C. Objections to Eliminating List of "Frequently Cited Grounds for Relief"

- The list of "frequently cited grounds for relief" in the illustrative forms provides helpful information to pro se filers.
- The list helps to focus the attention of pro se filers on specific issues, facilitating the narrowing of claims that are being presented to the court by the petitioner or movant.

D. Arguments in Favor of Retaining Questions on Grounds Raised in an Earlier Motion, Petition, or Other Application

- Information on grounds raised in an earlier motion, petition, or other application concerning the judgment of conviction is useful to the court in determining whether that opportunity to challenge the conviction bars the petitioner or movant under AEDPA from raising the ground of relief for the first or a second time in a § 2254 case or a § 2255 motion.

E. Objections to Retaining Questions on Grounds Raised in an Earlier Motion, Petition, or Other Application

- Asking the petitioner or movant to specify the grounds of relief raised in an earlier motion, petition, or other application may unfairly shift the burden of raising an affirmative defense from the respondent to the petitioner or movant. Under AEDPA, the one-year statute of limitations and failure to set forth all the grounds of relief in a single petition or motion may bar a later filing. Compelling the petitioner or movant to disclose information relating to these defenses relieves the respondent of much of its burden to plead “affirmative defenses.”

F. Rules Committees’ Consideration

The committees concluded that the lists of “frequently cited grounds for relief” in the illustrative forms following the § 2254 and § 2255 rules were counterproductive. In some cases, the lists do help to narrow the potential claims raised by a petitioner or movant, especially those who submit filings pro se. Furthermore, the lists offer an articulable set of issues that may in some cases simplify the court’s deliberations. But the committees concluded that the lists are more likely to increase the probability that the petitioner or movant: (1) will take a “shotgun” approach and select inappropriate grounds of relief, burdening the respondent and court with unnecessary work, or (2) will be misled into believing that the claims were limited to those found in the list. The committees were also concerned that the lists might create the misperception that the court is counseling the petitioner or movant and is assuming an adversarial position.

The questions on the illustrative forms pertaining to information regarding an earlier motion, petition, or other application concerning the judgment of conviction are on the existing forms. The committees believed that retaining the information is essential in the efficient handling of petitions and motions under the § 2254 and § 2255 rules. Many petitions or motions filed under the § 2254 and § 2255 rules are quickly disposed of because they do not comply with AEDPA’s requirements. Absent this information, the respondent and the court would waste much time and energy on the disposition of the merits of the claims that would ultimately be barred by AEDPA. The committees concluded that this information is necessary to properly review the petition or motion. The committees did not agree that providing this information would shift the burden to demonstrate an “affirmative defense” from the respondent to the petitioner or movant.

Federal Rules of Evidence

I. Evidence Rule 804(b)(3)

A. Brief Description

The proposed amendment to Rule 804(b)(3) requires “particularized guarantees of trustworthiness” indicating the reliability of an unavailable witness’s statement against penal interest *incriminating* the accused. The amendment conforms the rule to the Supreme Court holding in *Lilly v. Virginia*, 527 U.S. 116 (1999). Under the existing rule, the prosecution is only required to show that the statement is disserving to the declarant’s penal interest.

The longstanding admissibility requirement that the reliability of a hearsay statement against penal interest of an unavailable witness *exculpating* an accused must be supported by “corroborating circumstances” is retained in the rule. The proposed amendments initially published for comment would have extended the “corroborating circumstances” requirement to civil cases. But the advisory committee agreed with the public comment objections and rejected extending the standard to civil cases.

B. Arguments in Favor

- The existing rule concerning hearsay statements incriminating an accused is not consistent with constitutional standards as determined in *Lilly*.
- The proposed amendment eliminates a potential trap for counsel who may object to a hearsay statement incriminating an accused as inadmissible solely because it does not comply with the rule and not on constitutional grounds, incorrectly assuming that the rule comports with the Constitution’s Confrontation Clause.

C. Objections

- The proposed amendment sets up two different standards that may create confusion concerning the admission of hearsay statements incriminating or exculpating an accused.
- The amendments do not explain the difference, if any, between the two standards.

D. Rules Committees' Consideration

The rules committees concluded that the rules must comport with constitutional doctrine. The committees believed that it was important to eliminate the risk that a practitioner might, in the mistaken reliance on the rule's requirements, inadvertently waive an objection to the admission of the hearsay statement incriminating an accused by failing to raise Confrontation Clause constitutional grounds.

The committees recognized that the difference between the two standards is not sharply defined. Although there is substantial case law explaining what is meant by "corroborating circumstances" supporting a hearsay statement exculpating an accused, the precise extent of "particularized guarantees of trustworthiness" required to support a hearsay statement incriminating an accused is subject to developing case law. The Committee Note is intended to provide as much guidance as is possible to the bench and bar to understand the differences between the two standards. The Note points out the factors to be considered under each standard.

The Supreme Court has granted certiorari in a case involving the admissibility of a custodial confession offered against an accomplice as a declaration against penal interest under the evidence code of the State of Washington. That case might give the Court an opportunity to revise Confrontation Clause jurisprudence. This should not have an effect on the proposed amendment to Rule 804(b)(3), however, because the statement admitted in the Washington case would not be admissible under the current or amended Federal Rule 804(b)(3). Moreover, even if the Supreme Court revises Confrontation Clause jurisprudence, the requirement that the prosecution must provide particularized guarantees of trustworthiness for a declaration against interest offered by an accused serves an important function in assuring that the accused is convicted only by reliable evidence.